



**Kamande v Maisha Flour Limited & another (Petition E032 of 2021) [2023] KEHC 22326 (KLR)
(Constitutional and Human Rights) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22326 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E032 OF 2021
LN MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

FLORENCE MWIHAKI KAMANDE PETITIONER

AND

MAISHA FLOUR LIMITED 1ST RESPONDENT

TDF GROUP LIMITED 2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner, Florence Mwihaki Kamande, describes herself as a model brand ambassador for different commodities in Nairobi County, the Republic of Kenya and Africa as a whole.
2. She filed this petition alleging that her rights under Articles 28, 31 and 40(5) of *the Constitution* had been violated by the actions of the Respondents herein.

Petitioner's Case

3. The petitioner avers that on or about 1st May, 2020; the 2nd respondent (with whom she had previously worked with for about a year in 2016) erected bill boards around Thika Road Mall, James Gichuru Road and Buruburu bearing the image of the petitioner and branded with the 1st Respondent's product.
4. The petitioner claimed that she had not consented to her image/ likeness being used for purposes of advertising and creating the impression that she was endorsing the advertised product.
5. The petitioner averred that her right to privacy under Article 31 was violated.



6. That her image and likeness was exploited for commercial gain without any permission or compensation as it was used to advertise Maisha Unga, (the 1st Respondent's product) thereby violating her right to publicity – being the exclusive right of an individual to market his/her image, her likeness or persona for financial gain.
7. The petitioner stated that the respondents admitted to using her image but made no effort to ensure that petitioner was compensated.
8. The petitioner thus prayed for the following reliefs:
 - i. That a declaratory order be issued that the action of the Respondent infringes the petitioner's rights, under Article 28, 31(c) and 40 (5) of *the constitution* Section 30, 30A, 35(1, 2) of the Copy Rights Act of Kenya, and is therefore, unlawful, unconstitutional.
 - ii. That a declaratory order be made that the respondent used the Petitioner's image for commercial exploitation.
 - iii. That a declaration order be made that the Petitioner was clearly identifiable in that Advertisement.
 - iv. That a declaration order be made that there was no consent from the petitioner.
 - v. That a declaratory order be made that the petitioner has suffered damages, both emotionally and financial due to the respondent's action.
 - vi. Costs of the petition be borne by the Respondents.
 - vii. Respondents be directed to fully compensate the Petitioner for the unlawful use of her image without consent at the prevailing commercial market rates.
 - viii. This Honourable Court be pleased to issue such further or other orders as it may deem just and expedient to meet the ends of justice.
9. The petition was supported by affidavit of Florence Mwhaki Kamande sworn on 25th January, 2021 where she amplified the contents of her petition. In particular, she swore that on or about December, 2016, the petitioner entered into a contract with the 2nd Respondent (TDF Group Limited) for advertisement of Nuvita Biscuits and that the agent who introduced her to the 2nd Respondent had no agreement to receive payment for her as agreement was between her and TDF (2nd Respondent). That contract was finally executed for the purpose of Nuvita Biscuits for only 2 years terms as exhibited in annexure FMK 1. That it was shocking to find her images of her in billboards along Thika Road, Kiambu, Kileleshwa and Buruburu without her consent considering she did not submit her photo to the 2nd respondent for that project. These billboards were branded with Maisha Unga, the product of the 1st Respondent yet she had never engaged or conducted business with the 1st Respondent. That due to unauthorized use of her image her constitutional right to privacy had been breached by the respondents, and was not even paid to use of her photographs hence was subjected her to exploitation for private gain by the respondent. That as a result, the respondent had subjected her to emotional and financial damages and at this fair and just that respondent compensate her.

1st Respondent's Response

10. The 1st respondent, (Maisha Flour Ltd) responded through the replying affidavit of Kamaldeep Singh sworn on 22nd February, 2021.



11. The 1st respondent stated that it is a Manufacturer and Exporter of wheat products which include Maisha Flour and Maisha Feeds and part of its business strategy is to widely market its brands through outsourcing marketing needs to other entities.
12. It affirmed that it entered into a contract with 2nd respondent to run a new advertisement campaign for its brand Maisha flour, which it contracted the 2nd Respondent to manage wholly and exclusively run.
13. The 1st respondent thus asserted that it had role in the advertising campaign save for remitting the agreed consideration to the 2nd respondent and as it was the sole responsibility of the 2nd respondent to identify suitable images to be used to design the advertisement and ensuring that it observed all image rights in running the advertisement.
14. In particular, the 1st respondent: -
 - i. Was not involved in identification of persons the 2nd respondent selected in the campaign advertisements.
 - ii. Did not meet or know the persons selected by 2nd respondent for the campaign advertisements.
15. That the petitioner's claim that her image had been used in billboards was brought to the attention of 1st respondent through a letter by her Advocate dated 15th September, 2020 but the said letter was vague in that: -
 - a. It did not identify where the alleged bill-boards were erected.
 - b. Petitioner was a stranger to 1st Respondent and they had never met or any transacted business.
16. The 1st respondent contested the breach of privacy alleged by the petitioner in paragraph 4 of her supporting affidavit by pointing out that she had admitted that previously she had authorized the use of her image for purposes of advertising other products at agreed consideration.
17. That the petitioner had not specified how the 1st respondent had violated her constitutional rights.
18. The 1st respondent further averred that this not a valid constitutional grievance but on ordinary commercial dispute that ought not to be determined before a different forum.

2nd Respondent's Response

19. The 2nd respondent response was through a replying affidavit by Jay Varia, a Director with TDF Groups Limited.
20. The 2nd respondent stated that it entered into a contract with the petitioner through her managing agent, Barbuh Casting, whereby all business dealings involving the petitioner were done through the said agent. Consequently, the 2nd respondent never at any time dealt with the petitioner directly.
21. The 2nd respondent accepted that in December, 2016, the petitioner through her agent entered into a contract with 2nd respondent for advertisement of Nuvita Biscuits of which Ksh.60,000/- was paid to her agent as exhibited in annexure "TDF3".
22. It was deposed on behalf of the 2nd Respondent the petitioner was thus dishonest in not enjoining her agent as a party in these proceedings.
23. The 2nd Respondent further swore that Nuvita Biscuits pulled out of that project prematurely although the petitioner had already been paid in full. As a consequence, they reached a verbal



- understanding that if she was required at a later stage for another advertising job, her image will be used using the said consideration since no refund was demanded from her.
24. Consequently, when the 2nd Respondent was contracted by the 1st respondent, the 2nd respondent reached the petitioner's agent and informed them that they intended to use the petitioner's image and forwarded to them the draft contract that the petitioner had signed previously for amendments and execution.
 25. That when the 2nd respondent received the invoice for the new contract, it noted that it was referring to Nuvita Biscuits and not Maisha Flour advertisement and thus requested the petitioner's agent to amend the name in the invoice to reflect that of 1st respondent which was done and the same was thus forwarded afresh.
 26. At all times, the said respondent believed consent of the model was obtained but it was not until a month after running the advertisement that the 2nd respondent received a complaint from the model about the use of her image for advertisement of Maisha Flour instead of Nuvita Biscuits with the petitioner demanding payment of Kshs. 100,000/-.
 27. The agent was contacted by the 2nd respondent and agreed to sort out the issue in view of the previous consideration of Ksh.60,000/-
 28. The 2nd respondent stated that the 1st respondent was not privy to the agreement between 2nd respondent and the petitioner or any of the models contracted by the 2nd respondent.
 29. The 2nd respondent averred that there was no breach of constitutional rights to privacy as the petitioner is already in the business of promoting different brands using her image and also the fact that her image was not used to tarnish her reputation or publicise her person.
 30. The 2nd respondent reiterated that they acted on the strength of belief that consent had been obtained from the petitioner by her agent, and if any damages were suffered by the petitioner, it was purely due to her agents oversight in coordinating and formally concluding the transaction with her and not the 2nd Respondent.

Submissions by the Petitioner

31. The Petitioner commenced her submissions by rehearsing the factual background upon which this petition rests.
32. She denounced the assertion made by the 2nd Respondent that the petitioner had entered into a contract between with 2nd Respondent through an agent by the name Barbuh Casting submitted that this was not true observing that none of the respondents had produced/annexed any contract to support this allegation; that what the 2nd respondent produced is an agreement entered into in the year 2016 which was to run for two (2) years until 2018; none was produced to go on to the year 2020.
33. The petitioner contended that her constitutional rights to privacy (Under article 31(c)), her inherent dignity and right to have dignity respected under article 28 and article 40(5) which provides for protection of intellectual property rights were violated by the unlawful use of petitioner's image by the respondents for commercial purposes without her consent as the respondents did not deny using the same.
34. The petitioner submitted that she is not seeking any commercial compensation considering that there was no contract existing between the petitioner and the 1st respondent but rather justice and declaration



that her constitutional rights were violated and hence seeking compensation under Article 23 of *the constitution*.

35. Relying on the case of Wangechi Waweru Mwendu Vs Tecno Mobile Limited; Rogers Ouma t/a Ojwok Photograph (Third Party) (2020) eKLR, the petitioner argued that the court in that case was persuaded by Jessicar Clarise Wanjiru Vs Davinci Aesthetics and Reconstruction Centre & 2 Others (2017) eKLR where Justice Mativo held that:

“intrusion of personal life by whatever means or form such as photography, written articles or caricatures may be a ground for an action for breach of privacy.”

36. Further, the case of Samson Mumo Mutinda Vs Inspector General National Police Service & 4 Others (2014) eKLR, where it was held that consent when granted, amounts to a waiver to a claim founded on breach of right to privacy.

37. The petitioner protested the 2nd respondent’s contention that no right to privacy was breached because the petitioner was in business of selling her image. She stated that even if she was in that business, it was still her right to choose whomsoever she wanted her image to be associated with and her consent to a specific use, it did not give leeway to any person to use it anyhow in blatant violation of her privacy and dignity. The petitioner argued that despite the respondents admitting using her image without her consent and for commercial use, they had not paid her a penny.

38. The petitioner argued that due to this violation of her privacy through viewership exploitation of her image, she was entitled to compensation. She relied on case of M. W. K & Another Vs Attorney General & 3 Others [2017] eKLR, where violation of constitutional right to dignity, degrading treatment and privacy attracted an award of Kshs.4,000,000/-; Ann Njoki Kumena Vs KTDA Agency Ltd (2019) eKLR where the issue was publication that tainted their image in legal profession that attracted an award of Kshs.1.5 Million.

39. In the present case, the petitioner submitted that she is a well-known brand ambassador in Kenya and Africa having worked with Multi-Choice/DSTV South Africa and Nigeria, Safaricom, NCBA, CFC Stanbic Bank, Edulink International School, Equity Bank all with estimated viewership of over Ksh.500,000,000/-. She thus urged the Court to grant her Kshs. 30,000,000/-.

40. The petitioner submitted that she is not required to particularize and prove general damages citing the case of Donald Eliakim Ohon Vs Faulu Kenya DTM Limited (2020) eKLR and NWR & Another Vs Green Sports Africa Limited & 4 Others, 2017, eKLR, where it was held that: -

“an award of compensation is an effective remedy for redress of an established infringement of a fundamental right under *the constitution* and quantum of compensation would depend upon the facts and circumstances of the case where quantum of damages entails exercising a judicial discretion.”

Submissions on behalf of 1st Respondent

41. In its submissions, the 1st respondent zeroed on two issues for determination, namely:
- a. Whether the petitioner has discharged the burden of proving that she did not give consent for the use of her image and;
 - b. Whether the respondent can be held liable for the alleged breach of petitioner’s rights, if any, given the 2nd respondent has admitted that it was responsible for the impugned advertisement.



42. In submitting on the 1st issue, the 1st respondent placed reliance on the case of *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR in which Justice Mativo identified three key elements that ought to be established in a claim for infringement of a person's right to privacy namely: -
- a. Use of a Protected Attribute: The plaintiff must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well.
 - b. For an Exploitative Purpose: The plaintiff must show that the defendant used his name, likeness, or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.
 - c. No Consent: The plaintiff must establish that he or she did not give permission for the offending use."
43. The 1st respondent submitted that the petitioner did not discharge the burden of proof of demonstrating that she did not grant the consent, or that she did she not authorize the use of her image. In urging the court to find as much, then 1st respondent urged this court to be guided by a similar finding rendered by Justice Mativo in *Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others* [2017] eKLR, where the judge in finding that absence of consent had not been proved remarked as follows: -
- “...This third test has not been established to the satisfaction of the court. The petitioner alleges she did not give consent at all while the Respondent states that he contracted a designer to do the work and that the designer informed him that he had used the image of his girlfriend. It is important to note that petitioner did not rebut these allegations nor did she find it fit to file a supplementary affidavit to shed light on this issue or even deny the allegations or cast doubts. Instead, she opted to leave it to the court to weigh the two accounts. In my view, she had a duty to discharge the burden of proof and prove to the court beyond doubt that she did not grant consent nor did she authorize the designer to use her image...”
44. The 1st respondent thus argued in the absence of evidence of petitioner's Casting Agency, the evidence of the petitioner was partial, skewed in her favour and only based on her assertion, and could thus not be basis for a fair determination.
45. Concerning the 2nd issue, that the 1st respondent raised, that is, whether it should not be held liable for breach of petitioner's rights given that it had engaged the services of the 2nd respondent for all its advertising activity; The 1st respondent argued that it is undeniable that it had entered into an advertising agency agreement with the 2nd respondent to run advertising campaign for one of its brands which was exclusively run by the 2nd respondent without the 1st respondent's involvement. That it was not involved in identification of persons used in the campaign adverts and was not even privy to any agreement between 2nd respondent and petitioner or petitioner's Casting Agency and may thus not tell of the circumstances that led to the use of petitioner's image except discharging its contractual obligations with 2nd respondent.
46. It thus submitted that it is not liable for any tortious acts committed in the cause of transactions between the 2nd respondent, the Petitioner's Casting Agency or the petitioner. It submitted that an



agent can be held personally liable for damage when the principal did not authorize the wrongful conduct.

Submissions by the 2nd Respondent

47. The 2nd respondent submitted that it was necessary to carefully examine all the dealings between the petitioner and the 2nd respondent in order to determine the viability of her claim.
48. In that regard, the 2nd respondent pointed out that it was not in dispute that there existed a previous arrangement whereby the 2nd respondent through the petitioner's managing agent – Barbuh Casting had engaged the Petitioner. That on 4th, September, 2020 the petitioner wrote an email – annexure “TDF5”, addressed to Barbuh Casting and 2nd respondent, a fact she has not disputed.
49. The 2nd respondent explained that the contents of the said email demonstrate that the petitioner was aware of the current arrangement as in paragraph (a) she stated:
- a. I have been waiting on further directions on what the client decides either a reshoot or to use previous images.”
- which the 2nd respondent argues demonstrate that she had engaged Barbuh Casting and had allowed the use of her image to advertise and was even willing to do a reshoot.
50. Further, 2nd respondent also referred to paragraph (d) of the said email of 4th September, 2020 and pointed that the petitioner had indicated thus: -
- “on our case in 2016 the campaign was Nuvita which has been changed to Nuvita Atta mark 1 Flor campaign 2020 and was never presented to me prior”
- before demanding of payment of Ksh.100,000/: hence she was fully aware.
51. The 2nd respondent was thus categorical that the language of the petitioner in the email aforesaid was indicative of knowledge and consent and relied on the case of Shirley Jones vs Corbis Corporation 815 F. Supp. 2d 1108 (U.D.211) where it was held that:
- “Consent to use a name or likeness need not be express in writing, but may be implied from the consenting parties conduct and circumstances of the case.... It is undisputed that plaintiff voluntarily posed for photographs which she knew would display her image, to prospective buyers, for over 40 years without objection.”
52. The 2nd respondent thus argued that given the facts of this case, the petitioner cannot run away from her own consent for the use of her image for a public advert; and the issue should now be whether her dues were paid, which does not lie for determination before this court. The 2nd Respondent relied on the case of Jessicar Clarise Wanjiru v Davinci Aesthetics & Reconstruction Centre & 2 others [2017] eKLR where the court found for the Respondent as the Petitioner could not prove lack of consent.
53. The 2nd respondent contended that the images in question had previously been used in 2016, in a contract between petitioner and 2nd respondent and the only issue in the present petition is that they were now being used outside the contracted period of two (2) years; in addition, the petitioner had admitted she is a renowned brand ambassador who uses her images for advertisement as source of income, hence it cannot be argued that the alleged publication intruded on her privacy to demean her dignity and to subject her to emotional damage; as it was already in public domain.



54. He cited the scholarly writing of an author by the then Sheldon W Halpern who wrote this: -

“Several decisions concluded that a celebrity; particularly who has sought to capitalize on his notoriety, cannot claim that an unauthorized commercialization of his identity has injured his feelings. The celebrity effectively has waived his right of privacy and can have no relief under privacy umbrella..”

55. The 2nd respondent further contended that the claim on alleged infringement of intellectual property rights cannot also be sustained considering that she merely presented herself for her image to be taken and has not presented any evidence confirming she holds intellectual property rights of the images allegedly put out for the public adverts. That she is not the author and holds no copyrights over the same. Reliance was placed on the case of Wangechi Waweru Mwende v Tecno Mobile Limited; Rogers Ouma t/a Ojwok Photography (Third Party) [2020] eKLR, whereby the Respondent cited the following passage in reference to the provisions of the Copy Right act:

“The totality of these provisions protect an author or artist of visual art as owner of copyright and..... it is only the originator of visual art who can/may successfully plead and/or prove right to a copyright. The Plaintiff is owner of her image but not author or artist of original works herein the subject photograph.”

56. Concerning the claim for damages, the 2nd respondent opposed the same vehemently on the basis that: -

- a. It had been demonstrated by way of evidence that consent had been given by petitioner via email to Barbuh Casting.
- b. Petitioner had alleged images had been published in a number of billboards but no evidence had been availed to that effect as petitioner only availed images of a single billboard.
- c. No exemplary damages should be awarded as the said bill boards were promptly pulled down. The 2nd Respondent relied on the case of Wangeci Waweru Mwende Vs Techno Mobile Ltd (Supra) where the court refused to grant exemplary damages, as the defendant had mitigated loss or damage by pulling down offending use of plaintiff's image.

Analysis And Determination

57. The main point of contention in the petition before this court is the alleged exploitation of personality rights, that is, the image of the petitioner by the respondents without her consent.

58. Justice Mativo in *Jessicas Clarice Wanjiru Vs Davinci Aesthetics Reconstruction and 20 others* (2017) eKLR quoting the celebrated Canadian Case of *Krouse versus Chrysler Canada Ltd* that laid the ground such claims reaffirmed the key elements to be proved by a person whose claim is founded on breach of personality rights as follows:

- a. Use of a Protected Attribute: The claimant must show that the defendant used an aspect of his or her identity that is protected by the law. This ordinarily means a plaintiff's name or likeness, but the law protects certain other personal attributes as well.
- b. For an Exploitative Purpose: The claimant must show that the defendant used his name, likeness, or other personal attributes for commercial or other exploitative purposes. Use of someone's name or likeness for news reporting and other expressive purposes is not exploitative, so long as there is a reasonable relationship between the use of the plaintiff's identity and a matter of legitimate public interest.



- c. No Consent: The claimant must establish that he or she did not give permission for the offending use.
59. The personality attribute that the petitioner complained about was the use of her image/likeness to promote the product of the 1st respondent without her consent.
60. It is not in dispute that the image of the petitioner was used to endorse a product of the 1st respondent in the 2nd respondents' promotional materials.
61. What the respondents vehemently contested was the lack of consent that the petitioner had pleaded in her petition.
62. The respondents argued that despite the petitioner pleading that she did not give her consent for the use of her image; she failed to provide proof to that effect. In urging the court to find that the petitioner had not proved the absence of consent, the respondent submitted that the court should be guided by the reasoning of Justice Mativo in *Jessica Clarice Wanjiru* (supra) where the court dismissed the petitioner's plea of lack of consent because despite the replying affidavit indicating there had been consent, she did not file a supplementary affidavit disputing the assertion.
63. In the present case, the 1st respondent contended that in the absence of the petitioner's casting agency (Barbuh Casting), the petitioner's sole assertions cannot provide a sufficient basis for holding that she had not given consent for publication of her image.
64. The 2nd respondent referred to the prior promotions in 2016 and explained that the petitioner was introduced to it by the Casting Agency – Barbuh Casting which entered into contract with the 2nd respondent on her behalf to promote Nuvita Biscuits. This project was not completed as the instructing client – Nuvita Biscuits terminated it half-way but by then, the petitioner had already been paid Ksh.60,000/-.
65. The 2nd respondent submitted that as a result, it was agreed orally that instead of petitioner returning the cash she had been paid, the same may be utilized for another project in future should it arise. That according to the 2nd respondent was the agreement between the petitioner's agency and 2nd respondent. When the new project involving the 1st respondent came by, the 2nd respondent thus contacted the petitioner's agency as per the agreement and that is how the use of her image to advertise the 1st respondent's product came about.
66. The petitioner vehemently denied the above assertions. She insisted that the 2016 contract was an entirely different product. She was categorical that apart from the introduction by the Casting Agency to the 2nd respondent, the Casting agency never played any other role and never entered into any contract on her behalf with the 2nd Respondent. She pointed out that the annexed contract showed clearly that she personally and directly entered into the contract with the 2nd respondent to run for two years, until 2018. She denied knowledge of any other verbal contract.
67. The question then becomes, was consent obtained to use the image of the petitioner to promote the product of the 1st respondent or not?
68. Proving a negative averment is never a walk in the park though it is not an impossible task. Ordinarily, the person bearing the burden (in this case the petitioner) has to introduce the issue by asserting the lack of consent from her or denying any existence of any to the best of her own knowledge (in case of allegations of a written one).



69. Once this is done; then burden of production/evidential burden shifts to the person who affirmatively asserts that there was consent to prove that one was entered or provide its proof.
70. In the instant case, the petitioner was categorical that she did give any and was unaware of any contract that was in existence regarding the use of her image to promote the 1st respondent's product 'Maisha Unga'. That was a sufficient ground to call upon the respondents who insisted that there was consent to marshal affirmative evidence to that effect.
71. I am thus unable to agree with the respondents' contention that the petitioner did not discharge the burden of demonstrating lack of consent on her part.
72. Equally, I do not agree with the proposition by the 2nd Respondent that to demonstrate that fact, it was petitioner's duty to avail Barbuh Casting Agency so as to support her assertion of lack of consent.
73. This is because Barbuh Casting Agency is introduced in these proceedings through the disposition of the 2nd Respondent. It is the 2nd respondent who alleged that there was an oral agreement that was entered into between the 2nd respondent and Barbuh Casting Agency on behalf of the Petitioner, not the petitioner, a fact denied by the petitioner. It thus did not fall on the petitioner to call Barbuh Casting Agency. Section 107 of the *Evidence Act* Cap 80 squarely places that burden on the party that asserts existence of a fact. It states: -

“Section 107: Burden of Proof

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent to existence of facts which he asserts must prove that those facts exist.”

74. To prove that the petitioner had granted consent, the 2nd respondent referred this court to annexure “TDF 5” in its replying affidavit which is the email dated 4th September, 2020 that it stated was authored by the petitioner and in the said email in which the petitioner had referred the subject matter in question. This according to the 2nd respondent was sufficient proof that she was aware of intention to use her images for she was even ready to go for reshoot and as such the issue that lies between is only a matter of payment and not the lack of consent.
75. I have carefully scrutinized the said email in question of 4th September, 2020 which the petitioner does not dispute writing. From the outset, it is apparent that the petitioner is grumbling about what she describes as “authorized use of her image on the bill board for Maisha Atta Mark 1”. She says: -

“I Florence Mwhiki Kamande and your cast of 2016 Nuvita Biscuits Campaign (Ladder Model) wish to express my deep concern in the recent use of my image from 2016 shoot on bill-board for Maisha Atta Mark 1 floor campaign...”

At paragraph (9) of the email, she writes: -

- a. Use of my image without my consent;
“I Florence Kamande signed the attached documents to act as proof of existence as a model as per the communication as opposed to it being a release form, hence the amount was never mentioned nor did I fill in the part. I have been waiting for further directives on what the client decides either as a reshoot or use the previous images only to discover from a friend that my image was used in the billboard. Attached is the form as sent it via WhatsApp and the image of bill-board in question...”



76. The email then refers to a body known as Kecamatwa (Kenya Acting Agent Models and Talent Welfare Association) then at paragraph (c) writes further: -

(c) ... “On no account shall material be aired/published before the talent has been paid except by prior agreement which according to this case, no prior arrangement was made till date. The bill board has been on for about one and half months from date when I discovered.”

77. At paragraph (d) the email reads: -

“(d) lastly, according to Kecamatwa each shoot should be a single campaign unless otherwise indicated prior to signing the contract. On our case in 2016, the campaign was Nuvita Biscuits which has been changed to Maisha Atta Mark flour Campaign 2020 and was never presented to me prior....”

78. It is the above email which the 2nd respondent referred to in an attempt to demonstrate that the petitioner had consented to her image being used to promote the Atta Mark 1 flour. In my view, that is a vain attempt by the 2nd respondent to twist the facts. In the email, the petitioner is explicit in stating that the intention of using her previous image from 2016 Nuvita Biscuit Campaign to promote Maisha Atta Mark 1 for 1st Respondent was never presented to her.

79. The respondents appear not to have responded directly to the petitioner on this email. They did not raise the issue of existence of the alleged oral agreement she had allegedly entered into through the Casting Agency- Barbuh Casting Agency that made that possible.

80. On the basis of the foregoing facts, it is my finding that the petitioner’s images were used for the campaign of Maisha Atta Mark 1 without her consent.

81. Moreover, I am not persuaded that because she was a model who had admitted to being in the business of advertising brands and her image was already in public domain, she could not claim violation constitutional right to privacy and/or other violations. The right against unauthorized intrusion into one’s privacy is granted to all except where there are reasonable exceptions authorized by the law.

82. Further, Article 40 of *the Constitution* protects the property rights, and this includes intellectual property. It provides at Article 40 (5) as follows:

“The state shall support, promote and protect intellectual property rights of the people of Kenya.”

83. Flowing from the Canadian decision of *Krouse Vs Chystler Canada Ltd*, cited with approval in *Jessicar Clarice Wanjiru Case* (supra), there is growing acceptance that an individual possess property rights in exclusive marketing for gain of his personality attributes such as name, image or voice that deserve protection under the law.

84. In the South-African case of *Wells Vs Attol Media (PTY) Ltd & Another Versus Western Angetta Cape High Court*, Case No. 11961 of 2006, the court stated as follow: -

“...The appropriation of a person’s image or likeness for commercial benefit or advantage may well be case for legal intervention. In order to protect the individual concerned.... When the photograph is employed, as in case, for benefit of magazine sole to make, profit it constitutes unjustifiable invasion of person’s rights of the individual...”



85. The above judicial pronouncements affirm an evolving jurisprudence that is gradually embracing the concept of property right in one's unique personality attributes such as image, voice or name that are now legally protected from commercial exploitation without the concerned person's consent.
86. In the instant case, the petitioner's image was used for purposes of promoting the 1st Respondent's product by the 2nd respondent without her consent. Her right to exclusive use of her image for marketing for gain was exploited commercially without her consent. This was an infringement of her right under 40(5) of *the constitution*.
87. The petitioner also claimed that her right to privacy was also violated through the display of her images on billboards bearing the 1st respondent product without her knowledge and consent.

Article 31 provides: -

"Every person has a right to privacy, which includes right to have: -

- (c) Information relating to their family or private affairs unnecessarily required or reviewed."

88. The respondent submitted that the petitioner had already admitted to be a brand ambassador whose images had been used for promotional purposes hence cannot claim her privacy had been intruded by publication of the images since it did not in any way ruin her reputation.
89. That the images used had been used in connection with a previous promotion hence the infringement of her privacy through the publication of the said were images did not arise. In my view, an individual should be free to choose what they should be associated with. To use the petitioner's images for promotion of a product she had not endorsed was violation of the privacy to the extent that her private views about the product she was allegedly marketing were neither sought no required prior to the said publication.
90. The other claim made by the petitioner was violation of Article 28 on human dignity. Article 28 provides: -
- "... every person has inherent dignity and right to have that dignity respected and protected..."
91. The respondent position on violation of human dignity was that her feelings could not have been injured by the publication because she did not allege any damage to her reputation and further because the image had been in public domain having been used in connection with previous projects.
92. In my view, what is paramount here is whether respect due to petitioner as a human being with the right to make a choice was demonstrated when dealing with her by the respondents.
93. On the basis of facts on the record, I do not think so. I find it absolutely demeaning and disrespectful to the person of the petitioner that her images should be displayed in public billboard along major roads and estates within the City promoting a product she had no idea of. Her own views or concerns about the whole scenario did not matter to the promoters. She was merely an object for purposes of promoting sales. That was totally belittling of her personality. She deserved respect. It goes against the tenets of Article 28 which requires that every person's dignity to be respected and protected. I thus find that her rights under Article 28 were violated by the actions of the respondents in the circumstances.
94. Having, therefore found that the petitioner's constitutional rights under Article 40(5), 31 and 28 of *the constitution* were violated, I reach the conclusion that the petitioner is entitled to the relief of compensation.



95. The next question, therefore, will be on extent of that compensation.
96. However, prior to that, it is necessary that I settle the question of liability as the 1st respondent exonerated itself from the same stating that it had contracted the entire business of promoting its products to the 2nd respondent. The 1st respondent asserted that it was not involved in identifying the images of those that were used in the advertisement campaign and did not in any way direct the work of the 2nd respondent after it assigned it the work.
97. The 2nd respondent in its reply and submissions did not contest the position put forth by the 1st Respondent.
98. The question thus arises, is the 1st respondent liable to the petitioner in damages in the circumstances of this case?
99. As a general rule, a principal cannot be held liable for the wrongful acts done by its independent contractors.
100. Nevertheless, in every general rule, there exists what the law refers to exceptions or qualification to the general rule.
101. For instance, exemption from liability cannot succeed if the principal is negligent in selecting, instructing or supervising an independent contractor hence can still be held liable in certain circumstances.
102. A matter which concerns observance of constitutional rights of the subjects hired in connection with the business of a principal cannot in my view be left entirely in the hands of a hired 3rd Party. The principal bears the ultimate responsibility of ensuring that the 3rd Party/agent observes the constitutional rights of those he directly links with the business of the principal.
103. In the present case, the ultimate benefactor of this promotion campaign was the hiring party – the 1st respondent. The fact that images of the petitioner were used in promoting the 1st respondent's products is not disputed. The 1st Respondent had the ultimate responsibility of ensuring that the rights of any subject linked to that the campaign that was mounted by the 2nd respondent were not violated by the hired party as it was the employer. That is a duty that was non-delegable and could not be contracted away.
104. No efforts appear to have been made by the 1st respondent to ascertain that the 2nd respondent had taken measures to ensure the petitioner's constitutional rights had been secured/guaranteed before using her images to the 1st respondent product. The 1st respondent was thus negligent in executing its ultimate responsibility of ensuring that the contracted assignment was done in full compliance of constitutional dictates on observance of human rights. I thus find that the 1st respondent was jointly culpable.
105. The only issue that remains now is the extent of quantum.
106. Under Article 23 of *the constitution*, an order for compensation forms part of reliefs that a court may grant in a claim alleging breach/violation of constitutional rights.
107. For the petitioner, the following decisions were relied upon: -
 - a. MWK Vs Attorney General & 3 Others (2017) eKLR, where Justice Mativo awarded Kshs.4,000,000/- for violation of constitutional rights to dignity, degrading treatment and privacy.



- b. Ann Njoki Kumena vs KTDA Agency ltd (2019) eKLR, where Justice Gitari awarded Ksh.1,500,000/- where the issue was a publication that tainted the professional image of the claimant.
108. In the present case, the petitioner submitted that an award of Ksh.30,000,000/- (Thirty Million) is appropriate given that she is a renowned brand ambassador who has worked with multi-choice which has presence in Nigeria and South Africa, Safaricom, Nebot, CFC Stanbic, Edu Link International School, Equity Bank among others with cumulative viewership of approximately 500,000,000.
109. Despite the claim of a large cumulative viewership and working with these big companies, the petitioner did not provide any evidence to that effect. That allegation could thus not sway this court in determining the assessment of damages. In any case, she did not demonstrate how the said publication affected her standing with the said multi-nationals and/or big companies.
110. Consequently, doing the best that I can and purely based on facts on record, it is my considered view that an award of Six Hundred and Fifty Thousand (Ksh.650,000/-) should adequately compensate the petitioner for the proved violation.
111. Considering that the said billboards were pulled down, the compensation should adequately vindicate the petitioner for the violation of her constitutional rights under Article 40(5), 31 and Article 28.
112. She is also entitled to costs of this petition.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023.

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L N MUGAMBI

JUDGE

